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**SUBMITTED ELECTRONICALLY AND BY U.S. MAIL**

**RE: Response in Opposition to Competitive Enterprise Institute's May 13, 2019  
Correction Request Regarding EPA's 2009 Finding that Greenhouse Gases  
Endanger Public Health and Welfare**

The Environmental Defense Fund opposes the Competitive Enterprise Institute's (CEI's) May 13, 2019 Request for Correction (RFC) of the Environmental Protection Agency's (EPA's) 2009 finding that greenhouse gas (GHG) pollution endangers public health and welfare (Endangerment Finding) and the underlying Technical Support Document (TSD) for that finding.

As explained in detail below, the Endangerment Finding and TSD rest on a vast body of rigorous, peer-reviewed scientific research confirming that GHG pollution is driving destructive changes in our climate that pose a grave and growing threat to Americans' health, security, and economic well-being. The agency developed the Endangerment Finding with several rounds of public input, rigorous peer review, and an exhaustive review of contemporary climate science literature. Unsurprisingly, the Endangerment Finding survived numerous legal challenges and searching judicial review, and it was eventually upheld by the D.C. Circuit Court of Appeals in 2012 (a decision the Supreme Court declined to review).<sup>1</sup>

Since 2009, the science supporting the Endangerment Finding has only grown stronger and more conclusive – as both EPA and the federal government's own scientific agencies have repeatedly recognized. CEI's assertions that the peer review process underlying the TSD was flawed are completely baseless, and in no way call into question the soundness of the TSD or the Endangerment Finding. Moreover, CEI's request raises stale issues that were thoroughly

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<sup>1</sup> See *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

considered and rejected in the exhaustive rulemaking that led to the 2009 Endangerment Finding, the subsequent reconsideration of that finding by EPA, and the litigation before the D.C. Circuit.

Further, CEI's requested remedy – the “withdrawal” of the Endangerment Finding, a duly promulgated final rule adopted after notice and comment per Clean Air Act (CAA) § 307(d) – is an unlawful response to a request for correction under the Information Quality Act (IQA). CEI's requested remedy shows that its true intent is to unlawfully use the IQA to subvert the administrative process where it has previously been unsuccessful, and invalidate a duly promulgated rule.

For these reasons, EPA must reject CEI's request.

## **I. The 2009 Endangerment Finding**

In 2009, EPA promulgated the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). These findings concluded that six well-mixed greenhouse gases (specifically CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>) can reasonably be anticipated to endanger public health and public welfare in light of their association with climate change.<sup>2</sup>

EPA promulgated these findings in the wake of the landmark 2007 Supreme Court decision in *Massachusetts v. EPA*.<sup>3</sup> There, the Court held that EPA has clear authority to regulate greenhouse gas pollution under the Clean Air Act, and that EPA must ground make a science-based determination as to whether GHG pollution endangers public health and welfare (or explain why the evidence is insufficient to allow such a determination to be made).<sup>4</sup>

Following the Supreme Court's decision in *Massachusetts*, the agency embarked on a lengthy evaluation process that involved significant public engagement. An early draft of the TSD, providing scientific documentation in support of the agency's eventual Endangerment Finding, was first published with an Advance Notice of Proposed Rulemaking (ANPR) on July 30, 2008.<sup>5</sup> The ANPR then underwent a 120-day public comment period, wherein EPA received a number of comments focused specifically on the contents of the TSD.<sup>6</sup> The TSD was subsequently revised to reflect these comments and new scientific information that had been made available since July 2008, and was re-released with the proposed Endangerment Finding on April 24, 2009.<sup>7</sup> The proposed Endangerment Finding then underwent a second, 60-day public comment period, which included two public hearings and yielded over 380,000 comments.<sup>8</sup> The final Endangerment Finding was published in the Federal Register on December 15, 2009.<sup>9</sup>

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<sup>2</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases in Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). *See* 42 U.S.C. § 7521(a)(1) (Endangerment Finding).

<sup>3</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>4</sup> *Id.* at 532-33.

<sup>5</sup> 74 Fed. Reg. at 66,510 (Dec. 15, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 66,500.

<sup>9</sup> *See id.* at 66,496.

In addition to substantial public involvement, the 2009 Endangerment Finding is based on a vast body of rigorously peer-reviewed scientific literature that overwhelmingly confirms the danger that climate change – and the GHG pollution that drives it – poses.<sup>10</sup> As discussed in the text of the Endangerment Finding, the Administrator relied primarily on climate assessments prepared by the United States Global Change Research Program (USGCRP), National Research Council (NRC), and the Intergovernmental Panel on Climate Change (IPCC) as the basis for her determination.<sup>11</sup> These three assessments themselves analyzed thousands of individual peer-reviewed studies to develop and publish the syntheses of climate science that inform EPA’s findings.<sup>12</sup>

During the comment periods, a few groups raised concerns about EPA’s reliance on these assessments, arguing that the agency should have considered other studies, that the peer review was insufficient, or that EPA should have conducted its own assessment.<sup>13</sup> The agency has addressed these concerns several times over: for example, in the final rule,<sup>14</sup> the TSD,<sup>15</sup> its Response to Comments documents,<sup>16</sup> and in its 2010 denial of petitions for reconsideration.<sup>17</sup> EPA explained that, compared to the assessments it relied upon, “[n]o other source of information provides such a comprehensive and in-depth analysis across such a large body of scientific studies, adheres to such a high and exacting standard of peer review, and synthesizes the resulting consensus view of a large body of scientific experts across the world.”<sup>18</sup> The TSD provided with the 2009 Endangerment Finding outlined the strict peer review procedures observed by the organizations that prepared these assessments, including review by the U.S. government,<sup>19</sup> and EPA further elaborated on these procedures in its Response to Comments documentation.<sup>20</sup> Before relying on these scientific assessments, EPA reviewed the methodology

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<sup>10</sup> Cf. *Coal. for Responsible Regulation v. EPA*, 684 F.3d at 102 (“The body of scientific evidence marshaled by EPA in support of the Endangerment Finding is substantial.”).

<sup>11</sup> 74 Fed. Reg. at 66,510.

<sup>12</sup> *Id.* at 66,511.

<sup>13</sup> See, e.g., *id.*; EPA, ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(A) OF THE CLEAN AIR ACT: EPA’S RESPONSE TO PUBLIC COMMENTS VOLUME 1: GENERAL APPROACH TO THE SCIENCE AND OTHER TECHNICAL ISSUES 1-2, (hereinafter “RESPONSE TO COMMENTS, VOL. I”) [https://www.epa.gov/sites/production/files/2016-08/documents/rtc\\_volume\\_1.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/rtc_volume_1.pdf).

<sup>14</sup> 74 Fed. Reg. at 66,510-12.

<sup>15</sup> EPA, TECHNICAL SUPPORT DOCUMENT FOR ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES IN SECTION 202(A) OF THE CLEAN AIR ACT 4-5 (2009) (hereinafter “TSD 2009”), [https://www.epa.gov/sites/production/files/2016-08/documents/endangerment\\_tsd.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/endangerment_tsd.pdf).

<sup>16</sup> RESPONSE TO COMMENTS, VOL. I, at 1-32.

<sup>17</sup> See EPA, EPA’S RESPONSE TO THE PETITIONS TO RECONSIDER THE ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(A) OF THE CLEAN AIR ACT, VOL. III: PROCESS ISSUES RAISED BY PETITIONERS 7-12, (hereinafter “RESPONSE TO PETITIONS, VOL. III”), <https://www.epa.gov/sites/production/files/2016-08/documents/response-volume3.pdf>.

<sup>18</sup> See 74 Fed. Reg. at 66,510-12 (noting that “these assessments are comprehensive in their coverage of the greenhouse gas and climate change problem, and address the different stages of the emissions-to-potential harm chain necessary for the endangerment analysis. In so doing, they evaluate the findings of numerous individual peer-reviewed studies in order to draw more general and overarching conclusions about the state of science”).

<sup>19</sup> TSD 2009, at 4-8.

<sup>20</sup> See Response to Comments, Appendices A, B, C which can be found at EPA, *Appendices and PDF Versions of EPA’s Response to Public Comments on the Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases: Volumes 1-11*, <https://www.epa.gov/ghgemissions/appendices-and-pdf-versions-epas-response-public-comments-proposed-endangerment-and->

and content of the assessments with its own, in-house scientific expertise.<sup>21</sup> As EPA explained in its response to the petitions for reconsideration to the Endangerment Finding, “EPA concluded that the lengthy, comprehensive process was very robust, with checks and steps included to produce high-quality, unbiased reports” and, further, that the contents of these assessments were “comprehensive, balanced, carefully caveated with respect to certainty, clearly identifying supporting as well as non-supporting evidence, with conclusions drawn based on the entire body of the evidence, not just one part of it.”<sup>22</sup>

After the promulgation of the Endangerment Finding, EPA considered and rejected ten petitions for reconsideration.<sup>23</sup> Per the review standards of CAA § 307(d)(7), EPA rejected all the petitions because “the petitioners’ arguments and evidence are inadequate, generally unscientific, and do not show that the underlying science supporting the Endangerment Finding is flawed, misinterpreted by EPA, or inappropriately applied by EPA.”<sup>24</sup> EPA also determined that “[t]he petitioners’ arguments amount to a request that EPA ignore the deep body of science that has been built up over several decades and the direction it points in, and to do so based not on a careful and comprehensive analysis of the science, but instead on what amount to assertions and leaps in logic, unsupported by a rigorous examination of the science itself.” Fundamentally, none of the petitions raised an objection of “central relevance to the outcome of the rule.”<sup>25</sup> In support of this conclusion EPA provided three volumes, and over three hundred pages, of explanation and documentation.<sup>26</sup>

Following this exhaustive administrative review, the Endangerment Finding was upheld by the D.C. Circuit in *Coalition for Responsible Regulation v. EPA* (2012).<sup>27</sup> There, industry groups again challenged EPA’s use of scientific assessments, but the court held that EPA’s findings were supported by substantial evidence, and that the agency had considered the scientific evidence before it in “a rational manner.”<sup>28</sup> The Supreme Court declined to review the matter.<sup>29</sup>

EPA’s 2009 findings are further supported by recent developments in climate science. In 2015, EPA reviewed new climate assessments and affirmed its 2009 conclusions as part of the Clean Power Plan Final Rule, stating that these new assessments “strengthen the case that GHGs endanger public health and welfare both for current and future generations.”<sup>30</sup> The IPCC’s Fifth Assessment Report, released in 2014, noted that “[t]he evidence for human influence on the

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<sup>21</sup> RESPONSE TO PETITIONS, VOL. III at 9-10.

<sup>22</sup> *Id.* at 10.

<sup>23</sup> EPA’s Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010).

<sup>24</sup> *Id.* at 49,557.

<sup>25</sup> *Id.* at 49,561.

<sup>26</sup> *Id.* The supporting documentation for EPA’s response to the petitions may be found at EPA, *EPA’s Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, <https://www.epa.gov/ghgemissions/epas-response-petitions-reconsider-endangerment-and-cause-or-contribute-findings>.

<sup>27</sup> 684 F.3d 102.

<sup>28</sup> *Id.* at 122.

<sup>29</sup> *Id.*, cert. denied, 571 U.S. 951 (2013).

<sup>30</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,683 (Oct. 23, 2015).

climate system has grown since the IPCC Fourth Assessment Report.”<sup>31</sup> More recently, the USGCRP’s Fourth National Climate Assessment (NCA4), Volume I – the “Climate Science Special Report” – noted that “new observations along multiple lines of evidence have strengthened the conclusion that Earth’s climate is changing at a pace and in a pattern not explainable by natural influences . . . . Many lines of evidence demonstrate that human activities, especially emissions of greenhouse gases, are primarily responsible for the observed climate changes in the industrial era, especially over the last six decades.”<sup>32</sup> Volume II of the NCA4, released less than a year ago, concluded that “the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans’ physical, social, and economic well-being are rising.”<sup>33</sup>

CEI’s groundless attack on the 2009 Endangerment Finding completely overlooks – and offers nothing that calls into question – the robust and exhaustive process that led to the Endangerment Finding, as well as the overwhelming scientific consensus that is reflected in the Endangerment Finding. As is apparent from CEI’s request, nothing since 2009 has changed these characteristics of the Endangerment Finding. To the contrary, the overwhelming weight of scientific evidence in the past decade reinforces EPA’s finding .

## **II. CEI’s Claims Are Baseless**

### **a. CEI conflates the Endangerment Finding and the underlying TSD**

As a threshold matter, CEI erroneously conflates EPA’s Endangerment Finding and its underlying TSD. As mentioned above, the TSD is a separate document published by EPA that does not convey any judgment or conclusion regarding whether GHGs may be reasonably anticipated to endanger the public health and welfare.<sup>34</sup> That judgment is provided by the Endangerment Finding itself, for which EPA considered “all of the scientific and technical information in the record. It was the entire record – not just the TSD – that formed the basis for the final determination in the Endangerment Finding.”<sup>35</sup> Nothing CEI raises in its characterization of the TSD or of the Endangerment Finding meaningfully attacks the strength of the Finding or calls into question the underlying science.

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<sup>31</sup> IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT; SUMMARY FOR POLICYMAKERS 5 (2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf).

<sup>32</sup> D.J. Wuebbles et al., *Our Globally Changing Climate*, in CLIMATE SCIENCE SPECIAL REPORT 36 (2017), [https://science2017.globalchange.gov/downloads/CSSR\\_Ch1\\_Our\\_Globally\\_Changing\\_Climate.pdf](https://science2017.globalchange.gov/downloads/CSSR_Ch1_Our_Globally_Changing_Climate.pdf).

<sup>33</sup> Alexa Jay et al., *Overview*, in IN IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II 36 (2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch01\\_Overview.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch01_Overview.pdf).

<sup>34</sup> TSD 2009 at E-1.

<sup>35</sup> See EPA, EPA’S ENDANGERMENT FINDING FREQUENTLY ASKED QUESTIONS 2, [https://www.epa.gov/sites/production/files/2016-08/documents/endangermentfinding\\_faqs.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/endangermentfinding_faqs.pdf).

## b. The Endangerment Finding is neither a scientific assessment nor a HISA

According to CEI, the Endangerment Finding was a highly influential scientific assessment (HISA) because it was “novel, controversial, and precedent-setting.”<sup>36</sup> This characterization is false. The science underlying the Endangerment Finding was not new, controversial, or precedent-setting; it reflected the very clear, long-standing, overwhelming scientific consensus that greenhouse gases trap heat in the atmosphere, causing surface temperatures on the planet to rise beyond regular oscillations. In denying the petitions to reconsider the Endangerment Finding, EPA stated that the Endangerment Finding’s “understanding of how anthropogenic emissions of greenhouse gases cause climate change and how human-induced climate change generates risks and impacts to public health and welfare . . . has been decades in the making and has become more clear over time with the accumulation of evidence.”<sup>37</sup> The Supreme Court recognized the evidence of climate change in the first lines of its opinion of *Massachusetts v. EPA*, which came two years before EPA published the Endangerment Finding.<sup>38</sup>

Even if CEI’s assertion were correct (which it is not), such characteristics alone do not qualify the Endangerment Finding as a scientific assessment, much less a HISA. A scientific assessment, as defined by OMB’s 2005 Final Memo, is “an evaluation of a body of scientific or technical knowledge that typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information.”<sup>39</sup> CEI mischaracterizes the TSD as a scientific assessment, whereas the TSD merely *summarizes* scientific assessments.<sup>40</sup> This is especially so in light of EPA’s statement it neither developed new science to support the finding<sup>41</sup> nor conducted its own independent assessment of the primary scientific literature.<sup>42</sup> Finally, CEI’s claim that the Endangerment Finding was a “state of science report” is simply untrue. EPA did not conduct its own independent assessment of the scientific literature, but instead reviewed existing scientific information, finding that the “fundamental conclusions of the assessment literature remained sound as to the state of the science.”<sup>43</sup>

Importantly, the Supreme Court did not instruct EPA to create a scientific assessment in *Massachusetts v. EPA*.<sup>44</sup> To the contrary, the Court instructed EPA determine “whether sufficient

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<sup>36</sup> CEI, *Information Quality Act Correction Request Regarding EPA’s 2009 GHG Endangerment Finding* 3 (May 13, 2019) (hereinafter “CEI RFC”).

<sup>37</sup> 75 Fed. Reg. at 49,557.

<sup>38</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007) (“A **well-documented** rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a ‘greenhouse gas.’”) (emphasis added).

<sup>39</sup> OMB, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, 70 Fed. Reg. 2,664, 2,675 (Jan. 14, 2005).

<sup>40</sup> See 74 Fed. Reg. at 66,497 n.1 (“[T]he Technical Support Document (TSD) accompanying these Findings summarizes the major assessments from the USGCRP, IPCC, and NRC.”). The denial of petitions for reconsideration repeatedly references information “summarized” in the TSD. See 75 Fed. Reg. at 49,560, 49,564, 49,567, 49,574, 49,575.

<sup>41</sup> RESPONSE TO COMMENTS, VOL. I at 5, 7.

<sup>42</sup> RESPONSE TO PETITIONS, VOL. III at 8.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

information exists to make an endangerment finding” for GHGs. EPA did just that – it evaluated the scientific information and applied it to the legal criteria for an endangerment finding under the Clean Air Act. EPA subsequently promulgated the Endangerment Finding because sufficient information existed for the agency to determine that GHGs endanger the public health and welfare. Finally, CEI’s own comments at the time recognized that the EPA did not promulgate its own scientific assessment, criticizing EPA’s reliance on the findings of the underlying literature and the Administrator for “outsourcing her scientific assessment.”<sup>45</sup>

**c. Both OMB and EPA reasonably concluded that the TSD was also not a HISA**

Both OMB and EPA reasonably concluded that the TSD that EPA prepared to support its Endangerment Finding did not meet the OMB Bulletin’s definition of a HISA.<sup>46</sup> Unlike the three underlying peer-reviewed assessments, the TSD did not draw any new conclusions or independent assessments of the state of the science; it was, according to both agencies, “simply a word-for-word transcription of the summary conclusions contained in those peer reviewed assessments.”<sup>47</sup> The TSD did not even serve as the scientific foundation for the Endangerment Finding; rather, it was the pre-existing peer-reviewed assessments that provided a “state-of-science” synthesis and proved “highly influential” to EPA’s determination in its Endangerment Finding, not the TSD.<sup>48</sup>

It is significant that OMB, the agency charged with administering the Information Quality Act, agreed with EPA in its characterization of the TSD as “influential scientific information” (ISI), rather than a HISA. OMB agreed with EPA that the TSD is not a scientific assessment as defined in OMB’s peer review bulletin because the TSD did not evaluate the scientific information in the existing peer-reviewed assessments.<sup>49</sup> Notwithstanding the possibility of other opinions or characterizations, OMB recognized that its Peer Review Bulletin grants agencies “broad discretion to weigh the benefits and costs of using a particular peer review mechanism for a specific information product.”<sup>50</sup> Furthermore, OMB’s Peer Review Bulletin affirms that even for HISAs, the Bulletin “leaves significant discretion to the agency formulating the peer review plan.”<sup>51</sup>

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<sup>45</sup> See EPA, RESPONSE TO PETITIONS: VOL. III, <https://www.epa.gov/sites/production/files/2016-08/documents/response-volume3.pdf>. See also Public Comments of the Competitive Enterprise Institute On Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act 18 (June 23, 2009) (accusing EPA of outsourcing its decision-making on the state of climate science), Docket ID: EPA-HQ-OAR-2009-0171-3316.

<sup>46</sup> Michael A. Fitzpatrick, Associate Administrator, Office of Information and Regulatory Affairs Letter to Wade T. Najjum, Assistant Inspector General for Program Evaluation, EPA (June 17, 2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> EPA Office of Inspector General, PROCEDURAL REVIEW OF EPA’S GREENHOUSE GASES ENDANGERMENT FINDING DATA QUALITY PROCESSES (hereinafter “EPA OIG REPORT”), APPENDIX F 50-51 (Sept. 26, 2011), <https://www.epa.gov/sites/production/files/2015-10/documents/20110926-11-p-0702.pdf> (“OMB believes that EPA reasonably determined that the Endangerment TSD itself (as opposed to the underlying peer-reviewed scientific assessments of the NRC, IPCC, USGRP identified and discussed in the TSD) did not have the impacts or characteristics required to meet the OMB Bulletin’s definition of a highly influential scientific assessment.”).

<sup>50</sup> OMB, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, 70 Fed. Reg. 10 at 2665 (“The selection of an appropriate peer review mechanism for scientific information is left to the agency’s discretion.”).

<sup>51</sup> *Id.*

**d. Even though the TSD was not a HISA, EPA took extensive steps to ensure the scientific integrity of the information presented in the document**

Even though the TSD is not a HISA, EPA went beyond the requirements of an ISI by conducting multiple expert, interagency and public reviews that were reasonable and appropriate to ensure the scientific integrity of the TSD.<sup>52</sup> The TSD underwent a technical review by twelve federal climate change experts, internal EPA review, interagency review, and an exhaustive public comment period.<sup>53</sup> EPA undertook these measures *in addition* relying on existing and recent synthesis reports, which had each gone through extensive peer-review procedures.<sup>54</sup> As EPA explained, the information in the TSD was developed and had been prepared in a manner consistent with EPA’s Information Quality Guidelines.<sup>55</sup> In its review, OMB concluded that EPA complied with the requirements under ISI, adding that “the process through which EPA reviewed the [TSD] was a permissible exercise of the discretion afforded agencies under Section II of the OMB Bulletin, which provides that for such information “agencies need not have further peer review conducted on information that has already been subjected to adequate peer review.”<sup>56</sup> Likewise, the report from the Office of Inspector General on which CEI so heavily relies concluded that “EPA met statutory requirements for rulemaking and generally followed requirements and guidance related to ensuring the quality of the supporting technical information.”<sup>57</sup>

**e. CEI’s claims are baseless, unspecific, and do not raise any new objections**

CEI’s claims are baseless, unspecific, and do not raise any new objections. For example, CEI claimed that the peer review team empaneled by EPA had a “substantial conflict of interest” because individuals selected for the panel had leading roles in developing the assessment reports.<sup>58</sup> CEI also claimed that the panel was not sufficiently independent because one out of the twelve reviewers was an EPA employee.<sup>59</sup> These two assertions were already raised by EPA’s OIG<sup>60</sup> and thoroughly addressed by EPA – both in responses to public comments<sup>61</sup> and to those of the OIG.<sup>62</sup> Indeed, OIG in its final report “did not question the appropriateness of the 12

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<sup>52</sup> EPA OIG REPORT, Appendix G at 55.

<sup>53</sup> TSD 2009 at 4.

<sup>54</sup> *Id.* It is notable that EPA’s Peer Review Handbook indicates that HISAs do not require an external peer review if the assessment only consists of science previously peer reviewed and the peer review is deemed adequate under the agency’s policy. *See* EPA Peer Review Handbook, 4th ed. 6 (Figure 2a) (Oct. 2015) (EPA/100/B-15/001).

<sup>55</sup> *Id.*

<sup>56</sup> EPA OIG REPORT, Appendix F at 50.

<sup>57</sup> EPA OIG REPORT, AT A GLANCE.

<sup>58</sup> CEI RFC at 4.

<sup>59</sup> *Id.*

<sup>60</sup> EPA OIG REPORT, AT A GLANCE.

<sup>61</sup> RESPONSE TO COMMENTS, VOL. I at 59-60: (“[T]he federal experts offered unbiased and objective review because they were external and therefore not involved with the development of the TSD.”). In the accompanying footnote, EPA specifically addressed the one reviewer who was an EPA employee (explaining that “[t]he one EPA reviewer was not involved in the development of the TSD and therefore was an objective, unbiased reviewer”).

<sup>62</sup> *See* EPA OIG REPORT, Appendix G at 68 (explaining that the one of the 12 federal expert reviewers was an EPA employee, but “was not one of the original authors of the TSD, and her expertise in the human health impacts of climate change helped fill the balance of experts needed”); *see also* EPA OIG REPORT, Appendix A at 37 (EPA’s answer to Ranking Member that “none of the 12 participated in the drafting of the TSD”).



federal reviewers' expertise."<sup>63</sup> It also included EPA's belief that it had no reason to believe that the federal reviewers would have any conflict of interest issues because they were only reviewing the TSD for accuracy rather than re-opening or judging their prior work.<sup>64</sup>

What's more, CEI itself raised concerns, to which EPA responded, over the independence of the federal reviewers in comments submitted to EPA *ten years ago* during the Endangerment Finding's public comment period.<sup>65</sup> The comment argued that the TSD was infected by bias since it was reviewed by scientists who have contributed significantly to climate-change literature subject to the peer review.<sup>66</sup> CEI was unspecific then by asserting, without evidence, that the federal scientists had a "demonstrated lack of impartiality."<sup>67</sup> Ten years later, CEI has still failed to demonstrate with any hint of specificity this alleged claim of impartiality.<sup>68</sup> In response, EPA disagreed that the federal reviewers were not objective.<sup>69</sup> EPA went even further to explain its decision to have 12 federal experts review the TSD, including that none of them were involved in developing the TSD or Endangerment Finding in any way other than their review roles.<sup>70</sup>

As another example, CEI claims that EPA did not state how the underlying information in the IPCC, NRC, and USGCRP supporting the Endangerment Finding met the requirements of the OMB Information Quality Bulletin for Peer Review.<sup>71</sup> Once again, this is a stale claim that CEI and other commenters already raised,<sup>72</sup> and which EPA more than adequately responded to.<sup>73</sup> To begin with, EPA referred these commenters to its statement in the TSD that the comprehensive peer review processes in the underlying assessments "provide EPA with assurances that this material has been well vetted . . . and use of these assessments complies with EPA's information quality guidelines . . ."<sup>74</sup> EPA also meticulously detailed the peer review procedures of the IPCC and the USGCRP in its Response to Comments, both of which adhered

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<sup>63</sup> EPA OIG REPORT, Appendix G at 67. In response to EPA, the OIG stated that EPA did not fully meet the OMB requirement for independence of reviewers because, in its view, the TSD was a HISA and according to the OMB peer review bulletin "scientists employed by the sponsoring agency are not permitted to serve as reviewers for highly influential scientific assessments." Appendix G at 68. As discussed earlier, the OIG erred in concluding that the TSD was a HISA.

<sup>64</sup> Appendix G at 68.

<sup>65</sup> Public Comments of the Competitive Enterprise Institute On Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act 18 (June 23, 2009), Docket ID: EPA-HQ-OAR-2009-0171-3316.

<sup>66</sup> *Id.* at 19.

<sup>67</sup> *Id.*

<sup>68</sup> *See id.*

<sup>69</sup> RESPONSE TO COMMENTS, VOL. I at 7.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 5.

<sup>72</sup> In its 2009 public comment, CEI challenged the CCSP and IPCC assessments as failing to meet the relevant requirements for peer review. *See* Public Comments of the Competitive Enterprise Institute at 22-25 (also noting the "urgency for EPA to ensure that whatever it elects to base its decisions upon satisfies EPA's own peer review requirement."). Another comment (1-70) argued that EPA did not use an independent and objective peer review process and therefore failed to adhere to information quality guidelines under the IQA. *See* RESPONSE TO COMMENTS, VOL. I at 59.

<sup>73</sup> *See generally* RESPONSE TO COMMENTS, VOL. I at 58-60.

<sup>74</sup> TSD 2009 at 5.

to EPA's peer review guidelines and the IQA.<sup>75</sup> That CEI is calling out EPA for not explicitly stating compliance with the OMB Bulletin, when the agency did so for the EPA guidelines and IQA, suggests CEI is doing nothing more than arguing form over substance.

### **III. The Endangerment Finding Cannot Be Withdrawn in Response to an IQA RFC**

The Endangerment Finding is a duly promulgated rule pursuant to § 307(d) of the CAA.<sup>76</sup> As stated in the EPA Inspector General's Report, on which CEI heavily relies, "EPA fulfilled the statutory requirements for notice and comment rulemakings mandated in the Administrative Procedure Act and in Section 307 of the CAA."<sup>77</sup> CEI requests that EPA "withdraw" the Endangerment Finding in response to its RFC, which would amount to repealing the Finding. However, there is a longstanding body of case law requiring the same standards for promulgation of rules as for their rescission, including the articulation of "a rational connection between the facts found and the choice made."<sup>78</sup>

CAA § 307(d) outlines the rulemaking procedure that governed the 2009 Endangerment Finding.<sup>79</sup> Broadly, the statute requires the publishing of a notice of proposed rulemaking in the Federal Register with an accompanying statement of basis and purpose, the maintenance of a rulemaking docket, and that the Administrator allow all interested persons the opportunity to submit comments.<sup>80</sup> The final rule must include the agency's response to significant comments and any additional data submitted during the rulemaking process.<sup>81</sup> Section 307 also provides guidance for parties wishing to raise objections to the rulemaking.<sup>82</sup>

As discussed in the sections above, EPA complied with these requirements in promulgating the Endangerment Finding. This was echoed in the Office of the Inspector General's report on the procedures underlying the Endangerment Finding.<sup>83</sup> The Notice of Proposed Rulemaking was published in the Federal Register on April 24, 2009.<sup>84</sup> The agency accepted comments on the proposal until June 23, 2009, including through two public hearings.<sup>85</sup> The final Endangerment Finding was published on December 15, 2009,<sup>86</sup> accompanied by eleven

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<sup>75</sup> See RESPONSE TO COMMENTS, VOL. I at 15, 53 ("EPA has fully complied with the requirements of the IQA.").

<sup>76</sup> 42 U.S.C. § 7607(d).

<sup>77</sup> EPA OIG REPORT 13 (2011).

<sup>78</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

<sup>79</sup> 42 U.S.C. § 7607(d).

<sup>80</sup> See the full text of 42 U.S.C. § 7607(d) for more detail on the specific rulemaking requirements.

<sup>81</sup> 42 U.S.C. § 7607(d)(6)(B).

<sup>82</sup> *Id.* § 7607(d)(7)(B).

<sup>83</sup> EPA OIG REPORT 13 (2011).

<sup>84</sup> Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,885 (Apr. 24, 2009).

<sup>85</sup> *Id.* at 18,886.

<sup>86</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495 (Dec. 15, 2009).

volumes of EPA's Response to Comments.<sup>87</sup> And as mentioned, the final rule was the subject of numerous petitions for review, all of which were denied by the D.C. Circuit.

This is the same process that EPA must undertake if it wishes to “withdraw” or otherwise amend the Endangerment Finding – and as discussed above, the evidence underlying the Endangerment Finding is so overwhelming that EPA could provide no well-reasoned justification for such an action. Moreover, nothing in the Information Quality Act<sup>88</sup> alters these bedrock requirements for altering a duly promulgated rule. As the D.C. Circuit has stated, “[t]he purpose of the Information Quality Act is to ‘ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) *disseminated* by Federal agencies’ and does not constitute a statutory mechanism by which the EPA’s *conclusions* reached . . . can be challenged.”<sup>89</sup> As such, the remedy that CEI seeks in its RFC is unlawful.

#### IV. Conclusion

EPA should reject CEI's RFC of the 2009 Endangerment Finding and TSD. EPA has thoroughly addressed all of the concerns raised by CEI through the rulemaking process, and CEI has raised no concerns that call the conclusions of the Endangerment Finding or TSD into question. EPA has demonstrated compliance with the IQA, OMB's Peer Review Bulletin, and its own guidelines multiple times over, including in its response to public comments and to the Inspector General's reports. In any event, CEI's position that EPA can withdraw the Endangerment Finding for a supposed violation of the IQA is meritless. For these reasons, EPA must reject this RFC.

Please direct any inquiries regarding this response to Ben Levitan at [blevitan@edf.org](mailto:blevitan@edf.org) or (202) 572-3318.

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<sup>87</sup> See all eleven volumes and appendices at EPA, *Appendices and PDF Versions of EPA's Response to Public Comments on the Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases: Volumes 1-11*, <https://www.epa.gov/ghgemissions/appendices-and-pdf-versions-epas-response-public-comments-proposed-endangerment-and>.

<sup>88</sup> Information Quality Act, Pub. L. No. 106-554, § 515 (2001).

<sup>89</sup> See, e.g., *Mississippi Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 185 (D.C. Cir 2015) (citations omitted) (emphasis in original).